

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CREDIT SUISSE SECURITIES (USA) :

4 LLC, ET AL., :

5 Petitioners : No. 10-1261

6 v. :

7 VANESSA SIMMONDS :

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9 Washington, D.C.

10 Tuesday, November 29, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:04 a.m.

15 APPEARANCES:

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17 Petitioners.

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19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae.

21 JEFFREY I. TILDEN, ESQ., Seattle, Washington; on behalf
22 of Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 JUSTICE SCALIA: We will hear argument next
4 in Case Number 10-1261, Credit Suisse Securities v.
5 Simmonds.

6 Mr. Landau, you may proceed.

7 ORAL ARGUMENT OF CHRISTOPHER LANDAU

8 ON BEHALF OF THE PETITIONERS

9 MR. LANDAU: Justice Scalia, and may it
10 please the Court:

11 In section 16(b) of the 1934 Exchange Act,
12 Congress created a cause of action to allow securities
13 issuers to recover short-swing profits from certain
14 covered persons, but specified that a lawsuit must be
15 brought 2 years after the date the short-swing profit
16 was realized. The statute doesn't say 2 years after the
17 date the defendants filed a section 16(a) report, as the
18 Ninth Circuit and Respondents would like to have it.
19 Nor does the statute say 2 years after the date the
20 plaintiff discovers the short-swing transaction, as the
21 government would like to rewrite it.

22 I would like to make two basic points here
23 today. First, as this Court recognized in *Lampf*, the
24 2-year time limit in section 16(b) is best read as a
25 period of repose that can't be extended at all; and

1 second, even if section 16(b)'s 2-year time limit could
2 be extended, the doctrine of equitable tolling wouldn't
3 apply to extend the time limit here, where the plaintiff
4 didn't act diligently to bring a claim and didn't prove
5 that any extraordinary circumstances precluded her from
6 filing. The upshot of these two points is that this
7 Court should reverse the Ninth Circuit's decision and
8 remand the case with directions to dismiss the complaint
9 as untimely.

10 JUSTICE SOTOMAYOR: Counsel, would --

11 JUSTICE GINSBURG: On your first -- on your
12 first point, you cite Lampf, but Lampf had two limits.
13 So it said -- what was it, 1 year from whatever -- from
14 discovery? And then it set an outer limit at 3 years,
15 and it was the same thing in Merck. Here we just say --
16 it just has what seems to me a plain vanilla statute of
17 limitations that is traditionally subject to equitable
18 tolling. We don't have that special kind of a statute
19 that gives you one limit and then sets up a further
20 limit that will be an outer limit.

21 MR. LANDAU: Your Honor, with respect, it's
22 certainly true that a two-pronged time limit underscores
23 that the outer prong is a period of repose, but there
24 are certainly no magic words that Congress has to use.
25 It doesn't have to use a two-pronged time limit to -- to

1 establish the outer limit as a period of repose. In
2 fact, that's really the lesson of this Court's decision
3 in TRW and in Beggerly and Brockamp, that the -- the
4 background or the default rule, the background rule that
5 equitable tolling applies, isn't some kind -- is just
6 that. It's a background rule. And Congress in the text
7 or structure --

8 JUSTICE KAGAN: But what takes you out of
9 that background rule in this case? You don't have the
10 two-pronged structure, which really did, as Justice
11 Ginsburg said, drive the analysis when we -- when we
12 talked about those provisions. So that's not there. So
13 what takes you out of the default position, which is
14 equitable tolling applies?

15 MR. LANDAU: Sure, Your Honor. I think --

16 JUSTICE KAGAN: The --

17 MR. LANDAU: The key point, Your Honor, is
18 that this Congress in the 1934 Exchange Act was
19 carefully attuned to the issue of time limits.
20 Congress -- there was -- there was a lot of discussion
21 of this. This is a not a situation where Congress
22 established a liability and just didn't focus on this
23 issue, as often happens, and left it to background
24 statute of limitations provisions of other background
25 rules. Congress thought long and hard about this.

1 With respect to the two-prong provisions,
2 those are the fraud provisions that were set at an outer
3 limit of 3 years. And then they actually created a
4 discovery rule that said: We don't even want people to
5 wait the whole 3 years; if they discover the facts
6 underlying their claim, we want them to bring it within
7 a year. So they used discovery to shorten the time, not
8 to extend it.

9 JUSTICE KAGAN: Right. But I guess I'm
10 still not understanding why, if you look at this
11 provision, you would think of this as anything other
12 than an ordinary statute of limitations. What is it
13 about this provisions -- or, I don't mean to -- to -- I
14 mean, you can -- you can make structural arguments. But
15 -- but you know, what factors do you think in this
16 provision makes it a statute of repose?

17 MR. LANDAU: Two things, Your Honor. First,
18 I would like to just finish on the structural point; and
19 we also have a textual argument.

20 With respect to the structure, this, let's
21 not forget, was enacted at the same time and as part of
22 the same statute as these other provisions that did use
23 discovery provisions to shorten the time limit. What
24 Congress did with respect to 16(b), instead of having
25 the 3-year outer limit plus a safety valve that would

1 make you have to sue even sooner, Congress has brought
2 in the outer limit. But -- instead of 3 years as in the
3 2-prong provisions, said you have got to sue within 2
4 years. Having said you have got to sue within 2 years,
5 they decided you didn't need that safety valve
6 provision. But it would be very --

7 JUSTICE GINSBURG: The problem is it reads
8 like dozens of statutes of limitations. It says: No
9 suit more than 2 years; and that I think there's the
10 general understanding that that limitation, that kind of
11 limitation, there is a presumption that it is subject to
12 equitable tolling, forfeiture, waiver. And why, if this
13 one doesn't use any different words -- why --

14 MR. LANDAU: Two things, Your Honor. This
15 legislation -- again, this section 16 is not a
16 standalone statute. It was enacted as part of the '34
17 Act. And so I think -- the same Congress that set a
18 hard outer limit of repose for fraud claims in section
19 9(e) and 18(c) wouldn't have wanted with respect to this
20 prophylactic provision that it is, by definition, both
21 under- and over-inclusive. It may be --

22 JUSTICE KAGAN: Well, I could turn the
23 argument around on you. Congress surely knew how to
24 write a statute of repose, because it did it in this
25 statute, but it didn't do it with respect to these kinds

1 of violations. This statute of limitations, I'm going
2 to call it, reads very differently from the two-pronged
3 positions that we've interpreted in the past.

4 MR. LANDAU: Again, Your Honor, I think one
5 point, just to respond to that, and as well to Justice
6 Ginsburg's question. The -- the typical textual hook
7 for a statute of repose is that it's keyed off of the
8 defendant's conduct -- 2 years after the defendant does
9 X, Y, or Z. That is as we quoted Black's Law Dictionary
10 for this proposition in our brief. The Seventh Circuit,
11 Justice Posner, had an opinion just last week
12 underscoring this point, the Hy-Vee case, that said the
13 typical statute of limitations actually says 2 years
14 after the cause of action accrued or after the plaintiff
15 discovered, but when you're -- when -- again, we don't
16 think -- in this case we are not relying solely on the
17 textual thing, but in terms of numbers of guideposts
18 this is not your classic statute of limitation. If you
19 actually start looking at them, a lot of them key off of
20 accrual.

21 JUSTICE ALITO: Is that -- is that true? If
22 we were to look at all the statutes of limitations in
23 the -- in the U.S. Code, we would find that they are
24 generally or exclusively drafted like section 1658, the
25 general statute of limitations provisions, and are

1 geared to or are triggered by the accrual of the action
2 rather than some event?

3 MR. LANDAU: Your Honor, I think we can't
4 say that there is a bright-line rule. Congress --
5 again, I think the most we can say is that the classic
6 formulation of a statute of repose is to key a time
7 limit off of the defendant's conduct as opposed to the
8 accrual. And again --

9 JUSTICE SOTOMAYOR: Well, the problem is
10 that the injury here is the defendant's conduct, meaning
11 if the nature of the claim, as is here, is that someone
12 has received a profit they are not entitled to, then the
13 injury is the same. The profit belonged to the
14 shareholders or the corporation, not to the insider.
15 So --

16 MR. LANDAU: Clearly to the --

17 JUSTICE SOTOMAYOR: -- textually the nature
18 of the claim here is the very injury, plaintiff's
19 injury.

20 MR. LANDAU: Well, Your Honor, again, one of
21 the things about this statute that is kind of odd, it's
22 a prophylactic statute that doesn't even require any
23 injury. I mean, it just says there has got to be
24 disgorgement to the corporation. It's a little bit
25 different --

1 JUSTICE SOTOMAYOR: Well, disgorgement is
2 injury, meaning that it's something that -- that you are
3 taking away from someone else.

4 MR. LANDAU: But it's taking it away from
5 the defendant. It doesn't actually mean that actually
6 somebody else would have earned that money.

7 JUSTICE SOTOMAYOR: Tell me what logic there
8 is in reading this as a statute of repose, other than
9 your argument about finality and its importance.

10 MR. LANDAU: I think --

11 JUSTICE SOTOMAYOR: If we take your
12 adversary's position that this statute of limitations
13 was geared under an understanding that an insider would
14 in fact make the requirements -- would file the
15 statements required by 16(a), then it makes absolute
16 sense to think of it as a statute of repose. But if
17 Congress understood that some wouldn't do the statutory
18 requirement and file in a timely manner, why wouldn't
19 equitable tolling be a more appropriate way to look at
20 this?

21 MR. LANDAU: I think the key point, Your
22 Honor, is to look at the 1934 Exchange Act as a whole,
23 which includes not only this provision but also
24 out-and-out fraud provisions that are for intentional,
25 real hard-core insider trading. That would be sections

1 9(e) and 18(c). There is no question that Congress
2 provided a period of repose for those, the outer limit.
3 And then that raises the question that Justice Ginsburg
4 started with, which is, do you have to have a two-prong
5 limit? And the answer to that is no, you don't. There
6 is no magic words, as TRW, Beggerly and Brockamp show
7 us. You just have to try to make sense of the statute
8 as a whole. And Congress would not have wanted to give
9 repose to intentional fraudsters but not give repose to
10 a defendant in a purely prophylactic section 16(b)
11 action. I think that's the fundamental thing when you
12 just step back and look at this.

13 JUSTICE GINSBURG: Well, it -- it's not
14 simply prophylactic. I mean, there is an objective that
15 16(a) expresses. That is, Congress wanted these trades
16 to be reported and to have this form filed, Form 4
17 filed. So it's a -- it's a disclosure-forcing
18 provision, 16(a) is. Then why would Congress mean for
19 it to operate to immunize a defendant who has not made
20 that filing, and who has concealed what's supposed to be
21 reported in 16 -- under 16(a)?

22 MR. LANDAU: Your Honor, for the same reason
23 that Congress would have afforded repose even to out and
24 out fraudsters. Again, Congress was creating vast new
25 liability here. A fraudster by definition, as somebody

1 who would be liable under 18(c) or 9(e), has done kind
2 of to conceal it. Yet Congress still believed, because
3 it was creating this vast new liability.

4 JUSTICE KAGAN: Judge Posner, Mr. Landau,
5 has a theory for why it is that fraud is treated
6 differently from the 16(b) offenses, and it's that it's
7 much more important to prevent strategic behavior
8 involving timing in fraud suits -- the stock price goes
9 up, the stock price goes down -- whereas in these suits
10 damages are fixed. It doesn't really matter where you
11 bring them, so it's not nearly as important to set a
12 clear limit.

13 MR. LANDAU: Well, like many of Judge
14 Posner's theories, it's -- it's a very clever theory.
15 But in a sense, it misses the fundamental truth that
16 when Congress is granting repose it is trying to allow
17 people to turn the page on something in their past. The
18 idea that Congress would grant repose to more culpable
19 people but not to less culpable people --

20 JUSTICE KAGAN: Well, you have one theory,
21 which deals with culpability; and he has another theory,
22 which deals with strategic behavior. And I don't know
23 how to pick between those two theories, to tell you the
24 truth. The text doesn't suggest which one Congress was
25 thinking about. And that puts me back, and let's look

1 to this provision, and this provision looks like an
2 ordinary vanilla statute of limitations.

3 MR. LANDAU: Well, again, the only thing I
4 will say on repose before -- and I would like to turn
5 then, because we certainly don't need repose to win this
6 case, and -- and while we think it is best
7 characterized, this Court in *Lampf* had occasion to look
8 at all of the, the various time limits and see how they
9 all worked together. And this Court characterized
10 Section 16(b) as a statute of repose.

11 To be sure, that was dicta because *Lampf*,
12 itself was not a 16(b) case. But it was -- it was -- it
13 was a statement or it was a recognition that came after
14 looking at all of these, and it would be strange now to
15 say that, in fact, the 16(b) time period is
16 potentially -- the Court said it was more restrictive,
17 and both the majority and Justice Kennedy in dissent
18 agreed that it was a statute of repose.

19 JUSTICE SCALIA: Of course, *Lampf* was a
20 disaster, wasn't it? Congress had to try to patch up
21 what we had done.

22 MR. LANDAU: Absolutely not, Your Honor.

23 (Laughter.)

24 MR. LANDAU: *Lampf* stands as a landmark.

25 But -- but let me make clear, Your Honor. Our position

1 here today doesn't depend on this being a statute of
2 repose, because even if this 2-year time limit --

3 JUSTICE ALITO: Before you turn away from
4 the statute of repose, could I just ask you one more
5 question --

6 MR. LANDAU: Absolutely.

7 JUSTICE ALITO: -- on -- on that? If -- if
8 16(a) reports are not filed, how likely is it that a
9 potential 16(b) plaintiff will find out within the
10 2-year period that there were these trades?

11 MR. LANDAU: Your Honor, they can find out
12 in many ways, the same ways that any other securities
13 plaintiff, including a fraud securities plaintiff, can
14 find out. There are corporate books and records that
15 can be examined. There are other SEC filings and SEC
16 investigations. There is other litigation. This could
17 come up in an estate discovery -- estate or divorce
18 proceedings. There are whistle blowers, confidential
19 informers, brokers, counterparts -- counterparties.

20 Again, if Congress had wanted the Section
21 16(a) disclosure to be the trigger under Section 16(b),
22 it could have done so. And in fact, as we noted in our
23 brief, there was an early draft in the House that
24 created a two-prong provision and established for -- you
25 know, it's an outer limit of 3 years and an inner limit

1 of 6 months after the 16(a) disclosure.

2 JUSTICE ALITO: What would -- what are the
3 other filings that might disclose this?

4 MR. LANDAU: Well, Your Honor, again,
5 like -- this case is a good example. In this very case,
6 the contradiction at the heart of the plaintiff's case
7 is that they say, well, it can't possibly be discovered
8 without a 16(a) filing. There was no section 16(a)
9 filing. To this day, they say the statute of limitation
10 has not started to run.

11 JUSTICE SOTOMAYOR: Is there a public
12 document that a -- that a shareholder can look at to see
13 whether an insider has traded within 6 months?

14 MR. LANDAU: Well, Your Honor, there is not
15 a -- there is not a Form 4, which is a public document.
16 But not every securities filing requires a public
17 document. In --

18 JUSTICE SOTOMAYOR: I didn't ask that. I'm
19 going back to Justice Alito's question, which is how
20 easy is it to find out without the 16(a)?

21 MR. LANDAU: Well, again, there may be SEC
22 filings. There are --

23 JUSTICE SOTOMAYOR: That's a big thing. I
24 didn't ask maybe.

25 MR. LANDAU: Well, no, there -- there are

1 SEC filings that companies are required to make. There
2 are -- again, this is not a -- a -- selling -- buying
3 and selling shares is not something that can be done
4 alone in the dark of night. You need to have other
5 people involved with you. You need to have brokers
6 complicit. You -- it is a large amount of shares. The
7 counterparties.

8 JUSTICE SOTOMAYOR: So what is the
9 likelihood that a broker's going to turn you in?

10 MR. LANDAU: There are whistle blowers.
11 That's the -- that's the --

12 JUSTICE SOTOMAYOR: That's a very nice
13 thing, but how likely is that?

14 MR. LANDAU: Your Honor, brokers have their
15 own responsibilities. A broker could be held liable as
16 an aider or abettor to a violation.

17 JUSTICE SOTOMAYOR: How would the broker
18 know that the -- that his principal didn't file a form
19 he was required to?

20 MR. LANDAU: Well, again, the -- the broker
21 may get suspicious if the -- a broker may actually be
22 checking. If a -- if a -- if a CEO of a corporation is
23 suddenly selling all these things -- again, this is no
24 different than the way a securities plaintiff in an out
25 and out fraud case -- and those are brought every day,

1 Your Honor.

2 But again, I think the point here is that,
3 regardless of whether this is repose, even if you say
4 that this can be extended, it's certainly can't be
5 extended in the way that the Ninth Circuit extended it.
6 And we and the SEC, the government, agree on this: That
7 the Ninth Circuit adopted this absolute black letter
8 rule that says, it is tolled -- it doesn't even start to
9 run unless and until the section 16(a) report is filed.

10 JUSTICE GINSBURG: How about the Second
11 Circuit rule?

12 MR. LANDAU: The Second Circuit rule is more
13 of a notice approach that says that it -- but again,
14 Your Honor, the problem with the Second Circuit's
15 approach is that it doesn't reflect traditional
16 background norms of equitable tolling. Then if you say
17 it's not a statute of repose, then what do you do just
18 to figure out what Congress would have wanted?

19 You say Congress legislates against the --
20 the -- the backdrop of these kind of equitable
21 doctrines. So let's look at what equitable tolling
22 consists of.

23 This Court in many cases over the years --
24 it's been dealing with equitable tolling since almost
25 the first days of the Court, well into the 19th century.

1 In the most recent cases, the Court has made clear, in
2 the Holland case, for instance, just two terms ago, that
3 equitable tolling traditionally has two minimum
4 requirements.

5 First, there has to be diligence on the part
6 of the plaintiff. And in this context that means does a
7 reasonable -- did the plaintiff know or would a
8 reasonably diligent shareholder have reason to know of
9 the claim; and second, extraordinary circumstances.

10 And so, with respect to the Second Circuit's
11 decision in Litzler, Your Honor, that you mentioned, I
12 think it departs from traditional equitable tolling
13 in -- in a couple of ways. Most particularly it limits
14 it to actual knowledge. It doesn't say "know or should
15 have known," which again is the background rule, as we
16 and the government agree.

17 The second thing with respect to Litzler
18 where it departs from the background rule is it says
19 that it is -- per se gives rise to equitable tolling not
20 to file the section 16(a) and doesn't include any kind
21 of culpability on the defendant's part. And Judge
22 Jacobs, in footnote 5 of Litzler, dropped a footnote
23 saying that he would prefer to announce a tolling rule
24 that was more consonant with, again, background rules of
25 equitable tolling, that said only when the failure to

1 file the Section 16(a) was unreasonable or -- or
2 intentional, because he could say otherwise you could
3 have a purely technical or inadvertent violation that
4 would give rise potentially to equitable tolling, and he
5 didn't think that was right.

6 JUSTICE KAGAN: Mr. Landau, if we were to
7 agree with you on one or both of those two things,
8 wouldn't the normal course be to remand? And what's
9 your best argument for why we should decide it?

10 MR. LANDAU: Our best argument, Your Honor,
11 is that the district court in this case already decided
12 the very issue here. The district court said it is
13 undisputed, just on the pleadings, that -- that they
14 knew or should have known.

15 This case is probably the most egregious
16 kind of case that you can see for this proposition,
17 because everything here is a replay of the IPO
18 litigation and even the Billing case that came all the
19 way to this Court. This case was filed just a few
20 months after this Court decided Billing. And in
21 particular -- they have now -- the Respondents have come
22 and said: Well, what we didn't know here was group, and
23 we didn't know that the -- the underwriters were in a
24 conspiracy with the issuer insiders, and that was the
25 piece of the puzzle that we were missing. And --

1 JUSTICE GINSBURG: We had to accept the
2 plaintiffs' allegations as true. You may well be right
3 that they really knew or they should have known. But at
4 this stage we can't make that judgment because we have
5 to accept the plaintiffs' allegations as true.

6 MR. LANDAU: Correct, Your Honor, but you
7 are entitled, in deciding that, to look at their own
8 pleadings. And there is two important things from their
9 own pleadings.

10 First, if you look at their complaint,
11 it's -- it alleges lock-up as its theory of group. It
12 says the plaintiffs and the -- the underwriters and the
13 issuer insiders formed a 16(a) group because they had
14 these lock-up agreements. Well, those lock-up
15 agreements were publicly known as early as the
16 prospectus of these IPOs, so the -- the lock-up
17 agreement was no secret.

18 Second, they say, well, we -- even though
19 lock-up might have been out there, we didn't know there
20 was an underpricing-based conspiracy. And even assuming
21 they could try and slice and dice it like that according
22 to the -- the legal theory, the fact is in their motion
23 to dismiss in the district court, they cited -- this is
24 docket 58 in the district court, pages 1 to 2 -- they --
25 they go at length about the academic literature

1 regarding a conspiracy between underwriters and issuer
2 insiders that they say gives legitimacy to their
3 substantive claim.

4 But that includes lots of articles,
5 including a 2004 article -- again, 2005 would be 2 years
6 before they filed. So they are relying in their
7 opposition to our motion to dismiss on an article --
8 there is a lengthy footnote that says there is a ton of
9 academic research on this particular theory. So
10 basically, a remand is unnecessary because the -- the
11 pleaded facts by the plaintiff themselves show this is
12 untimely as a matter of law.

13 I would like to reserve the balance of my
14 time, if there's no further questions.

15 Thank you.

16 ORAL ARGUMENT OF JEFFREY B. WALL,

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

18 MR. WALL: Justice Scalia, and may it please
19 the Court:

20 I'd like to start where Justices Ginsburg
21 and Kagan did, because if you picked up this statute it
22 would look for all intents and purposes like an ordinary
23 statute of limitations. And the question then is, how
24 has Congress rebutted that presumption of equitable
25 tolling either as a matter of text, context or

1 structure?

2 And as I understand it, Petitioners have two
3 basic arguments, both of which are incorrect. The first
4 is textual. They say, well, it runs from the time of
5 the complained-of event. But the reason they can't put
6 too much weight on that, Justice Alito, is because if
7 they looked through the statutes and the Court's cases,
8 they would come across cases like Exploration Company,
9 or Delaware State College, where the statute ran from
10 the time of the complained-of event and this Court
11 treated it as an ordinary statute of limitations subject
12 to applicable for tolling. And they'd come across
13 Beggerly, which ran from accrual, and yet the Court said
14 statute of repose, not subject to equitable tolling.

15 JUSTICE ALITO: Well, if you were drafting a
16 statute of repose, how would you phrase it other than
17 the way this is phrased?

18 MR. WALL: I think normally what Congress
19 does is it says there should be no jurisdiction after a
20 particular time, because it's not trying to
21 differentiate among the application of different
22 equitable background principles.

23 But there are statutes --

24 JUSTICE SCALIA: Yes, but we've -- we've
25 said that, under our recent jurisprudence anyway, we

1 would -- we would treat that as a statute of
2 limitations. And I assume we'd treat it like a normal
3 statute of limitations subject to tolling?

4 MR. WALL: Justice --

5 JUSTICE SCALIA: Do you think whenever --
6 whenever we encounter a -- a statute of limitations that
7 is -- is phrased in jurisdictional term, there can be no
8 tolling?

9 MR. WALL: I think, Justice Scalia, that
10 where you have statutes that say there shall be no
11 jurisdiction after a particular time, this Court has
12 read them to cut off equitable tolling after that time.
13 But Congress could have written the statute to say the
14 time limit shall not be tolled. And there are statutes
15 like that. Now, most of those statutes say there shall
16 be no tolling except in particular circumstances,
17 because Congress has considered it more finely. But
18 they could make the prohibition absolute.

19 And the second argument that I understand
20 Petitioners to have is basically structural. They say,
21 well, look, they borrowed the language from the outer
22 prong of the two-prong limit.

23 JUSTICE ALITO: Before you get to that, do
24 you have an example of a -- a classic statute of repose
25 that we -- I could look at to see how they should be

1 phrased, and not one that says that there shall be
2 tolling -- there shall not be tolling except in some
3 circumstances, one that just says, "this is it; no
4 tolling whatsoever"?

5 MR. WALL: You mean other than statutes as
6 in Merck and Lampf, et al., where there were tiered
7 structures?

8 JUSTICE ALITO: Right. A standalone
9 provision.

10 MR. WALL: I think that the statute in
11 Beggerly was an example where the Court said, even
12 though it runs from accrual, it incorporates a discovery
13 rule and it sets a 12-year limit. So textually and
14 contextually -- I mean, I don't think there is any
15 classic formulation. I think that's why Petitioners
16 can't point you to anything, because the courts always
17 look to all the indicia of statutory meaning: Text,
18 context and structure. So the same language can create
19 a statute of limitations or repose.

20 So in Lampf and Merck, if those statutes
21 hadn't had a two-tiered structure, just the language of
22 the outer prong of the statute alone, I think the Court
23 would have treated it as a statute of limitations. The
24 Court didn't say in Lampf that language creates a
25 statute of repose, full stop. It drew a structural

1 inference by looking at both of the prongs and comparing
2 them to each other.

3 So when Petitioners say, whoa, but they've
4 borrowed the language of the outer limit and we know
5 that's repose, well, we only know it's repose in the
6 two-pronged provisions because of their structure. And
7 this provision doesn't have that structure.

8 So I don't think I can point you to any
9 classic formulation, because the same words can be
10 either limitation or repose, depending on what else
11 Congress does in that statute.

12 JUSTICE SCALIA: I don't -- I think you
13 understate the -- the strength of the Petitioners'
14 argument in -- in this regard. It seems to me where you
15 say, you know, 3 years unless the plaintiff knows sooner
16 than that, and then you say 2 years unless the plaintiff
17 knows earlier than that, and then you say 2 years, it
18 seems to me that the implication is 2 years, period.
19 Whether the plaintiff knows earlier, later, doesn't
20 matter.

21 MR. WALL: Justice Scalia, I don't know what
22 else to say except that that would overrule Exploration
23 Company and Delaware State College.

24 JUSTICE BREYER: That's what we said in
25 Merck. I mean, wasn't Merck just like that? It says a

1 cause of action can be or whatever -- it may not be
2 brought -- may be brought not later than the earlier of
3 2 years after the discovery of the facts or 5 years
4 after the violation.

5 I take it that means 5 years after the
6 violation. Forget about the discovery of the facts.

7 MR. WALL: Well, that's right, but the --
8 the reason that that language created a period of repose
9 was because of the structural inference. I took
10 Justice Scalia's hypothetical to be if the statute just
11 said no suit shall be brought more than X years after
12 the violation.

13 JUSTICE SCALIA: Well, but what if those
14 three provisions had been -- you know, followed each
15 other immediately. You know, 3 years unless, you
16 know -- with a cutoff that would make it shorter, and
17 2 years with a cutoff that would make it shorter, and
18 then a third one just says 2 years. You think there
19 would be no implication that the 2 years means 2 years,
20 period?

21 MR. WALL: I -- I think the implication
22 would be that in the others Congress created a period of
23 repose by using very specific language to do that. And
24 in the third, it didn't. It wrote it like an ordinary
25 statute of limitations. Now, it could have written it

1 differently, Justice Scalia. It could have said "no
2 suit shall be brought after X time," which is the
3 ordinary language of statute of limitations. "And that
4 time shall not be tolled." Congress has done that in
5 other statutes.

6 JUSTICE GINSBURG: If you extinguish the
7 claim -- the statute of limitations doesn't terminate
8 the claim. It just says you can't get a remedy if you
9 sue too late. But there are statutes that say you have
10 no claim after X time, and that would certainly be a
11 repose. You have no right anymore after that.

12 MR. WALL: No question. That's certainly
13 true. If the Court --

14 JUSTICE SCALIA: Maybe -- maybe you'd better
15 go -- well, go on. I think you better go to the other
16 point, because I want to know whether you differ from
17 the Petitioner on the second point. As I understand the
18 Petitioner, he does -- he does not think that you reach
19 the same result if indeed the violation had been
20 nonintentional. Now, do you take that position as well?

21 MR. WALL: No, Justice Scalia. I think that
22 is the one place in everything Mr. Landau said where
23 there is daylight between the Petitioners' position and
24 ours. In the government's view, the traditional
25 equitable rule is the statute is tolled until the

1 plaintiff has actual or constructive notice of the facts
2 underlying her claim. It doesn't matter whether the
3 concealment of those facts by the defendant that gives
4 rise to the --

5 JUSTICE KAGAN: But is that right, Mr. Wall?
6 I mean, don't we usually look when we are thinking about
7 equitable doctrines as to whether the defendant has
8 clean hands? You know, whether the defendant is
9 culpable or not seems to matter a good deal when we are
10 thinking about considerations of equity.

11 MR. WALL: Absolutely. And I think in many
12 fraud and concealment cases, where you are not talking
13 about a duty of disclosure, either common law or
14 statutorily, you do have affirmative misconduct. But
15 it's a different question when Congress has come in and
16 told the defendants by law what they have to do. For
17 the defendant then to breach that statutory duty -- I
18 think Congress has already told them what they have to
19 do in this context.

20 JUSTICE KAGAN: But I think Mr. Landau's
21 point -- it was a strong part of his brief, I think --
22 was that there was no reason why his clients would have
23 thought that they had a disclosure obligation in the
24 first place. So it wasn't that they were looking at
25 this disclosure application and saying: We don't feel

1 like it. They were saying: We're not covered by it.

2 MR. WALL: That just goes to Justice
3 Ginsburg's point, I think, which is that where a
4 plaintiff can sufficiently plead a section 16(b) case at
5 the motion to dismiss stage to survive dismissal under
6 Iqbal and Twombly, everyone agrees that if you've got a
7 16(b) potential violation, you have got a reporting duty
8 under 16(a). You can't have liability for a trade under
9 (b) that you weren't required to report under (a).

10 So if the plaintiff can sufficiently plead a
11 case at the motion to dismiss stage under 16(b), by
12 definition the plaintiff has sufficiently pleaded that
13 the defendant violated a reporting obligation --

14 JUSTICE ALITO: Now why is that true?
15 Somebody could be a -- an insider without knowing that
16 the person was an insider.

17 MR. WALL: That's right. But 16(a), except
18 for the criminal sanctions, is a strict liability
19 provision. If you are an insider and you fail to file,
20 you've violated 16(a). Now, you know, it's a separate
21 question on 16(b), but I think everyone here agrees that
22 if you have a violation of (b) you necessarily have a
23 violation of (a). You can't be forced to disgorge the
24 profits from a trade you weren't required to report.

25 JUSTICE ALITO: No, I understand that. But

1 I thought the point was -- I thought the question was
2 whether there is the kind of concealment that would
3 invoke equitable tolling when the concealment is not
4 done knowingly, when it is not done in -- in knowing
5 breach of a disclosure obligation.

6 MR. WALL: I think the -- the breach of a
7 duty, a statutory or common law duty, especially where
8 that duty is designed to aid in the enforcement of a
9 private right of action, is and has been considered by
10 courts to be concealment. Without looking at whether
11 the fiduciary just accidentally or inadvertently --

12 JUSTICE BREYER: There are two different
13 doctrines, I gather. One is equitable -- equitable
14 tolling. The other is sometimes called equitable
15 estoppel or fraudulent concealment. But whatever you
16 call them, if you take your position, a person who
17 really thinks he doesn't have to file and so he doesn't
18 file will be liable forever, there will be no statute of
19 limitations because the plaintiff will never find out.
20 Maybe 50 years later, all right.

21 If you take the opposite position, then you
22 will prevent plaintiffs in borderline cases from
23 bringing suits because they aren't going to find out if
24 somebody thinks it's a borderline case. I see one harm
25 one way, one harm the other way. You are arguing that

1 the second harm is the worst harm. Okay, why? What's
2 the argument.

3 MR. WALL: Justice Breyer, I want to fight
4 the premise.

5 JUSTICE BREYER: No, I'm making it for
6 you -- I'm making your argument or I'm trying to.

7 (Laughter.)

8 JUSTICE BREYER: I'm saying it's something
9 on your side and something on the other side. If he's
10 arguing it, you are wrong. Because if there is no bad
11 conduct by the defendant, he honestly thinks he doesn't
12 have to file, then the statute never runs. Okay?

13 MR. WALL: We have --

14 JUSTICE BREYER: But on the other hand his
15 position leads to the plaintiff never being able to sue
16 in borderline cases. Which is worse?

17 MR. WALL: You are absolutely right. They
18 are both bad. We've occupied the reasonable middle
19 ground. Hope you like it.

20 (Laughter.)

21 JUSTICE SCALIA: Thank you, Mr. Wall.
22 That's a nice note on which to end.

23 Mr. Tilden, we will hear from you.

24 ORAL ARGUMENT OF JEFFREY I. TILDEN

25 ON BEHALF OF THE RESPONDENT

1 MR. TILDEN: Justice Scalia, and may it
2 please the Court:

3 The underwriters argument and the
4 government's for that matter are founded on the notion
5 that Congress wanted someone who violated 16a to receive
6 the benefit of the statute of limitations or repose in
7 16b.

8 16b is unique in the securities law and
9 perhaps in the law generally, in that the plaintiff
10 suffers no injury and recovers no damages. There is no
11 triggering event, unlike a fraud case, their stock
12 drops, to suggest that you have been harmed. 16b is 99%
13 of the time irrelevant without a 16a filing. As a
14 matter of logic, it makes no sense to provide the one
15 who violates 16b an escape liability because they also
16 violate 16a.

17 JUSTICE ALITO: Well, what about as a matter
18 of language, whether or not 16b is a -- whether it's a
19 statute of a repose or a statute of limitations, it
20 tells you exactly when the time is supposed to begin to
21 run, from the -- from the realization of the profit.
22 And you want to say no, it doesn't begin to run from
23 that point, it begins to run from the point when some
24 other completely different external event occurs, if it
25 ever does occur, which is the filing of the 16a report.

1 Texturally, how do you get to that?

2 MR. TILDEN: We get here -- get there this
3 way, Your Honor. The court several times recognized
4 that 16b and 16a were interrelated. The limitations
5 period indeed provides, in the second sentence "such
6 profit and no such suit for such profit. " Well, what
7 profit and what suit are those?

8 To answer that question we must go to the
9 first sentence which refers to the profit of such
10 beneficial owner, director and officer. Who are they?
11 To know that we must go to 16a which is a single
12 sentence statutory command that directs "beneficial
13 owners of more than 10%, directors and officers to file
14 the form provided for below. " 16b is a statute of
15 limitations for those who file the form.

16 There is no statute of limitations in 16b
17 for those who do not. The statute of repose contended
18 for by the underwriters here would have this unique
19 feature: It would run invisibly to all but the
20 defendant. No one else has any notice, the clock is
21 ticking, but the defendant. This has a -- an
22 attractiveness if you are the defendant, but it doesn't
23 work well for the rest of us. No knowledge of a
24 triggering event and its running in the face of an
25 affirmative statutory duty.

1 JUSTICE KAGAN: But I think you are arguing
2 against the most extreme position. Another position is
3 just regardless of whether there's been a filing, if the
4 person knew or should have known, if a reasonable person
5 would have known, even if there were no filing, that's
6 enough.

7 MR. TILDEN: Your Honor, the -- there are
8 several responses to that. 16a we believe is the
9 discovery rule. Congress looked at this and commanded
10 insiders to put the information in a particular
11 location, so that shareholders who have the primary
12 enforcement authority under 16b can go find it there.

13 In the face of that congressional dictate,
14 can we graft an appendage on to the statute that says
15 notwithstanding the fact that the shareholder was told
16 that he or she could go look there and notwithstanding
17 the fact that they went to look there and there was
18 nothing there, they must nonetheless go elsewhere.
19 Congress said shareholder, go look behind door number 16
20 to see if the information is there.

21 JUSTICE SCALIA: They need not go elsewhere,
22 but when they have gone elsewhere and found out -- I
23 mean in this case it was not just that you reasonably
24 should have known it's that you did know. Isn't -- am I
25 right about that?

1 MR. TILDEN: No, sir, you are not right.

2 JUSTICE SCALIA: Okay.

3 MR. TILDEN: We alleged in the claim a -- a
4 conscious agreement between the underwriters and key
5 decisionmakers at the issuer underpriced the IPO. This
6 is extraordinarily counterintuitive behavior. It is not
7 listed or mentioned at all in the IPO filing in '02.
8 Judge Scheindlin's opinion in '03 nowhere refers to
9 group, agreement, contract, conspiracy.

10 JUSTICE KAGAN: So that would be --

11 JUSTICE SCALIA: Is that necessary to your
12 cause of action?

13 MR. TILDEN: A group plainly is. A group
14 is. It's a footnote, Your Honor.

15 JUSTICE SOTOMAYOR: Tell me what was hidden
16 from you in the prior filings in the academic literature
17 that your adversary points to? All of the facts you've
18 just recited have been written about extensively for
19 years and years. So, what new information did you
20 receive, told you that you should file a lawsuit?

21 MR. TILDEN: Your Honor, I disagree with the
22 premise, but let me work backwards. First, if we were
23 to apply a vanilla form discovery rule like Merck,
24 knowledge of the particular facts of the transaction, to
25 this day no one has knowledge of the purchase and sales

1 within six months and the profits. Those are elements
2 of a 16 -- I'm sorry a 16b claim, we lack knowledge.

3 Two, whatever it is a reasonable shareholder
4 ought to do to trigger a Merck-like plain vanilla
5 discovery rule, we have gone far beyond that. We cannot
6 impose on a shareholder the obligation to read the
7 journal of financial management or to follow a Harvard
8 symposium. Three -- and this --

9 JUSTICE SOTOMAYOR: You mean to tell me that
10 somebody's investing in the amounts that are invested
11 here and they are not following the fact that this has
12 been the center of securities litigation for years?

13 MR. TILDEN: Your Honor, this is a -- not a
14 garden variety 16b violation. I agree with you
15 completely regarding our level of involvement, but I do
16 not believe we present a standard 16b claim. But to
17 answer directly your question, the group allegation that
18 underwriters and key decisionmakers of the issuer
19 conspired together is not in the IPO case. The
20 allegation there was this: That the underwriters were
21 getting unrevealed compensation that should have been
22 disclosed. Should have been disclosed and was not.
23 Underwriter compensation and the allegation against the
24 insiders was that they knowingly or recklessly signed
25 the prospectus.

1 It's page, I believe, 310 of Judge
2 Scheindlin's opinion. So that is all that is alleged
3 there. There is no group activity, no notion that this
4 acted in concert or that they were acting in concert.
5 The notion that someone would deliberately underprice
6 their IPO first appeared in the scholarly research at a
7 Spring of '09 Harvard symposium a year and a half after
8 we filed our claim.

9 JUSTICE SOTOMAYOR: Could you answer what I
10 consider a very strong argument on their side, which is
11 Congress who creates a statute of repose for intentional
12 conduct like fraud, why would they not create a statute
13 of repose for what is a strict liability statute?

14 MR. TILDEN: The fraud case is all about --
15 involve, Your Honor, someone who has reason to know that
16 they have been defrauded. It may only be that they
17 bought their stock of X, and now, it's selling for half
18 of X, but they know something has happened. There is no
19 injury here. The 16b Plaintiff has suffered no injury.
20 It's critical to an understanding of what the Congress
21 contemplated at the time.

22 JUSTICE SCALIA: One would think, if the 16b
23 Plaintiff has really suffered no injury, it would be all
24 the more likely that Congress would want a statute of
25 repose.

1 MR. TILDEN: I don't believe, Your Honor --
2 the 1934 legislative history made it clear -- makes it
3 clear that Congress was extraordinarily concerned about
4 a broad sweep of misconduct in the '20s. They intended
5 a rule that in this Court's language in Reliance
6 Electric would be flat, sweeping, and arbitrary. They
7 intended to squeeze every penny of profit out of these
8 transactions, and they did so in 16(b).

9 This is not a trap for the unwary. Congress
10 has said you cannot be unwary. If you are an insider,
11 you must be wary. You must be wary. That's what
12 Congress has said.

13 If we are concerned about how this might
14 work going forward, and the underwriters have raised a
15 parade of horrors -- "oh, this is what will happen if
16 the Court adopts our position" -- one thing we might do
17 if we want to know what will occur in the next 64 or
18 77 years is look backwards at the last 64 or 77 years.
19 The Whittaker rule has been the rule in most of the
20 United States for virtually the entirety of the last
21 77 years.

22 JUSTICE BREYER: Maybe it's worked out, but
23 I don't understand it. I mean, why not just treat it
24 like a special -- regular statute of limitations? You
25 say that the profit is made on day 1. It was made by an

1 insider, and if your client finds out about it or
2 reasonably should find out about it, then the statute
3 begins to run.

4 MR. TILDEN: Your Honor --

5 JUSTICE BREYER: Otherwise it's tolled,
6 period. Simple, same as every other statute. What's
7 wrong with that?

8 MR. TILDEN: Well, we don't believe the
9 congressional design contemplated tolling. Congress
10 told shareholders we could go look in a particular
11 place. But here's one other problem with it.

12 JUSTICE BREYER: But there are people, you
13 see, who don't know. There are always borderline cases,
14 some people, whether it's this one or not, think maybe
15 they don't have to file. They think they are outside
16 the statute. So they don't. Okay?

17 You are protected. If they don't file, and
18 you wouldn't reasonably find out about it, fine. But
19 when you find out about it or should have, not fine.
20 It's very simple, and makes everything logical. It
21 seems to be fair to your client, certainly.

22 MR. TILDEN: It may be simple and fair, Your
23 Honor. We -- we don't believe it's what the language of
24 the statute provides for. It also suffers from this
25 additional defect: under the statute in this Court's

1 opinion in Gollust v. Mendell, the standing requirement
2 for 16(b) is that you own shares at the time of
3 institution of the action. This can be years subsequent
4 to the events themselves.

5 Can we adopt a statute of limitation, a
6 discovery rule that runs against someone who has not yet
7 required standing under Gollust? I wonder if we can.
8 It seems to me to defeat the special standing that
9 Congress intended 16(b) shareholders to have. You
10 acquire standing on day 700 when you purchase your
11 shares, only to find that you have no claim because you
12 were having imputed to you something that a shareholder,
13 which you were not, knew or should have known 3 years
14 earlier. Could that be --

15 JUSTICE KAGAN: Mr. -- Mr. Tilden, is there
16 any other context in which we would extend the
17 statute -- or we have extended or any court has extended
18 a statute of limitations without requiring that the
19 plaintiff be reasonably diligent? Can you point to any
20 other example of that?

21 MR. TILDEN: I cannot -- I cannot, Your
22 Honor, but I can also not point to a statute of
23 limitations such as this one that follows immediately on
24 an affirmative disclosure obligation imposed on the
25 defendant.

1 To answer a question Justice Alito raised in
2 response to one of my colleagues, I believe the best
3 analysis of the difference between a statute of
4 limitations and a statute of repose by this Court
5 recently is in the Beach v. Ocwen opinion. And in Beach
6 the Court analyzed the Truth in Lending Act and
7 concluded the language that said 3 years after the
8 transaction the right of rescission shall cease, was the
9 statute of repose. It was completely clear. It did not
10 rely on a discovery rule incorporated therein; it did
11 not require a -- did not rely on a second prong. Beach
12 cites the -- a prominent Harvard Law Review article at
13 63, Harvard Law Review, and is a wonderful analysis of
14 this Court's work on this subject.

15 A kernel of the motivation in the
16 underwriters' briefing is the notion that liability
17 under 16(b) is draconian, that they're -- that it's
18 harsh. It's important to note that all you have to do
19 under 16(b) is give back profit that never belonged to
20 you. In the words of the statute, it inured to the
21 corporation; you weren't entitled to it. It's as if the
22 penalty for bank robbery were that you merely had to
23 give the money back. No attorneys' fees, you don't have
24 to return your principal, you just give the money back.

25 Finally I would like to address a difference

1 between the Whittaker decision and the Litzler decision,
2 briefly. Both of these courts found that 16(b) only
3 worked by virtue of 16(a). In Whittaker the Ninth
4 Circuit said only by full compliance with 16(a) do your
5 16(b) rights mean anything; and in Litzler the Second
6 Circuit said 16(b) only works because of the absolute
7 duty of disclosure placed on the defendant. We agree
8 with that. We disagree with my buddy, Mr. Landau.

9 Most trading today occurs electronically in
10 the dark of night; it is invisible to everyone else.
11 But if the Court gets to the position where it is
12 debating whether Whittaker or Litzler ought to be the
13 rule --

14 JUSTICE SOTOMAYOR: Or the SG's.

15 MR. TILDEN: -- or the SG's, we would offer
16 this: There is no reported decision in which Whittaker
17 and Litzler will yield different results in our view.
18 Whittaker is a bright-line rule of the kind Congress
19 intended. Litzler is a rule that in its own words
20 requires "conceivably discovery and trial.

21 JUSTICE ALITO: And it requires actual -- is
22 that right? It requires actual knowledge on the part of
23 the plaintiff?

24 MR. TILDEN: Yes, sir.

25 JUSTICE ALITO: Does that make any sense,

1 given the -- the class of individuals who are plaintiffs
2 in 16(b) cases?

3 MR. TILDEN: We don't --

4 JUSTICE ALITO: Somebody who -- who is found
5 for purposes of litigation very often to have purchased
6 the stock long after all of this takes place, so the
7 lawyer who wants to bring this suit can just go out and
8 find somebody who knows nothing? Isn't that right?

9 MR. TILDEN: The -- there is much I want to
10 say in response to that. The underwriters contended in
11 the lower courts for a subjective rule. No party before
12 this Court contends for a subjective rule. We do not
13 believe that -- Whittaker is not a subjective rule, and
14 I do not believe that Judge Jacobs in Litzler was
15 arguing for a subjective rule.

16 What he envisioned -- he -- the judge had a
17 fair concern in the abstract. He said look, if they
18 don't file the form but the identical information is
19 available to all the world everywhere else, what's wrong
20 with that? Well, there's nothing wrong with it, except
21 that it's never available to all the world anywhere
22 else. No other securities filings reveal this.
23 Congress told us to go look in one place, and not
24 anywhere else. But the Litzler court I don't think
25 envisioned an actual notice rule. When it said

1 information as clear as 2 plus 2, I believe it was
2 seeking an objective rule, Whittaker-like, looking for
3 Whittaker acquittal and information. We don't believe
4 such a thing exists. That said, the Litzler rule
5 requires discovery in trial.

6 If the rules don't achieve different
7 results, then we have the choice between applying a rule
8 that is just speedy and efficient -- Whittaker, and a
9 rule that is just, slow and costly -- Litzler. Some
10 version of Ockham's Razor, if nothing else, ought to
11 support the application of the Whittaker rule and not
12 the Litzler should the Court find itself in that
13 position.

14 Here's the last thing I'd say and then I
15 will be quiet. Today is the first time this Court has
16 analyzed the issue before it, but it's come up
17 repeatedly in the lower courts over the last 77 years
18 and with one exception, 1954 in the Middle District of
19 Pennsylvania, the courts have unanimously rejected the
20 petition -- the position contended for by both the
21 underwriters here and the government. The rule has been
22 Whittaker or a Litzler variant of it everywhere, all the
23 time.

24 In 1934 the purchase or sale of a stock
25 required the actual knowledge of some other people.

1 Today it is an impersonal electronic transaction, often
2 at home in the middle of the night, invisible to
3 everyone. Insider trading was hard enough to uncover
4 then, it's gotten harder now. We do not believe that
5 Congress envisioned that any additional burden would be
6 placed on a shareholder by forcing to learn this
7 undetectable conduct within 2 years.

8 The most, in our view, famous pronouncement
9 by this Court with respect to the interpretation of
10 16(b) is out of the Reliance Electric opinion in 1962.
11 In Reliance the Court said, faced with a question, two
12 competing interpretations of the statute, the Court
13 should -- should select that interpretation that best
14 serves the congressional purpose of curbing short-swing
15 speculation by insiders.

16 JUSTICE SCALIA: The problem -- the problem
17 I have with your argument is, it's a very strange
18 statute of limitations. Accepting that it is not a
19 statute of repose, it says, you know, you have 2 years
20 after the -- the transaction that was failed to be
21 reported.

22 And you want to say what it means is you
23 have 2 years from the time it was reported. Congress
24 would have said that. It's so easy to say that. Two
25 years from the reporting.

1 MR. TILDEN: I grant you it could have said
2 otherwise, Your Honor, but we --

3 JUSTICE SCALIA: But I don't know any other
4 statute of limitations that achieves the result that you
5 want that puts it that way.

6 MR. TILDEN: Every other statute of
7 limitations we can think of, Your Honor, involves a
8 plaintiff who has reason to know of some harm, and
9 incidentally, where it covers damages. 16(b) Plaintiff
10 has no reason to know of harm and recovers no damages.
11 Right?

12 If I -- let's take a case that is seen every
13 day and every month, probably in every State in the
14 country. A lawnmower accident and a child or a teenager
15 loses a toe. You may not know anything about lawnmower
16 design. You may not know anything about your State's
17 product liability act or ANSI standards or the litany of
18 breach, causation and damages, but you do know that you
19 used to have ten toes and now you have nine.

20 There is no equivalent. The 16(b) plaintiff
21 does not know insider trading has occurred and won't
22 know unless he or she is told. They do not know someone
23 else somewhere has nine toes. As far as they know
24 everybody still has all of their toes.

25 No other statute of limitations will serve

1 as an analog here because of the unique character of
2 16(b). The plaintiff has no injury and recovers no
3 damages. We don't believe we can fairly look at other
4 statutes of limitation as a model given that
5 distinction.

6 The Reliance Electric court concluded if --
7 if you have a choice, you should select that
8 interpretation that best serves the goal of short-swing
9 trading by insiders.

10 We believe the -- the case before the Court
11 can and should be determined based on the wording of
12 16(b) itself. The limitations period in (b) applies to
13 those who file the form in (a). But if the Court
14 believes that the textual analysis is less clear than we
15 think, the Ninth Circuit should be affirmed based on the
16 interpretive principles of Reliance Electric,
17 nonetheless.

18 If there are no other questions, I will sit
19 down.

20 JUSTICE SCALIA: Thank you, Mr. Tilden.

21 Mr. Landau, you have 4 minutes.

22 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

23 ON BEHALF OF THE PETITIONERS

24 MR. LANDAU: Thank you, Your Honor. Very
25 briefly, just on repose, two quick points.

1 If there is any one theme that runs through
2 this Court's 16(b) jurisprudence, it's that precisely
3 because the -- Section 16(b) is prophylactic, it should
4 be interpreted in a literal and mechanical way. I think
5 the -- that argues for repose, because you don't get
6 into a lot of these questions about who knew what when.
7 And, so, that certainly would be consistent with -- this
8 case would fit well within that -- that tradition, if
9 you were to go that way.

10 In addition on repose, let's not forget that
11 Congress gave 2 years after the date the profits were
12 realized. If those profits were in a report, you
13 wouldn't need the whole 2 years, anyway. In fact, for
14 the fraud provision, you only get 1 year after you
15 discover it. So in a sense, I think that helps show
16 that even in a repose approach, 2 years is plenty of
17 time.

18 Then -- but assuming that you go with
19 equitable tolling, I think -- I would like to emphasize
20 that there is really four approaches that have been
21 brought forth. There's the Ninth Circuit's rigid
22 approach that it -- they call it equitable tolling, but
23 there's really nothing equitable about it. It's -- it's
24 we don't care about who knew what, when or anything. It
25 is you have to file the 16(a).

1 The district court actually struggled,
2 because the district court in this case said I'm
3 supposed to be doing something called equitable tolling,
4 and there's nothing equitable here at all, because I
5 think everything here was plainly known to the -- to the
6 plaintiffs or should have been known.

7 Then you have the Litzler approach, which
8 looks to actual knowledge. And I think as some of the
9 questioning brought out, there is no background rule
10 that distinguishes between actual knowledge and
11 constructive knowledge for purposes of equitable
12 tolling.

13 Again, I think as some of the questions
14 brought out, equitable tolling, because it is an
15 equitable doctrine, looks to has the defendant behaved
16 equitably and has the plaintiff behaved equitably?

17 We agree with the government, that
18 diligence, in other words, would a reasonable
19 shareholder -- did a reasonable shareholder know or
20 would a reasonable shareholder should have known is a
21 critical part of the inquiry that's missing in -- in the
22 Ninth Circuit's analysis.

23 Where we disagree with the government is
24 with respect to their -- their view of fraudulent
25 concealment to involve any violation -- any alleged

1 violation of a statutory 16(a) duty. Under the
2 government's view, it would be considered fraudulent
3 concealment and would -- we give rise to tolling.

4 If somebody were to come in today and say,
5 gee, the Microsoft IPO back in 1986, there was actually
6 a group in there, the underwriters conspired, and -- you
7 know, the thing is the difference between this case and
8 that one is this case happens to have involved this
9 hugely prominent IPO litigation that really brought all
10 these things to light, but the -- the defendant in that
11 Microsoft hypothetical would not have the advantage of
12 being able to point to the defendant's -- the
13 plaintiffs' lack of diligence saying this is all out
14 there.

15 So, you would be creating a regime, if you
16 go with the government's approach that really waters
17 down the defendant's culpability on the fraudulent
18 concealment side of equitable tolling, essentially they
19 are asking you to take the fraud out of fraudulent
20 concealment.

21 The only last point I would like to make is
22 that with respect to the specific facts here again,
23 counsel said today that this was not known until a
24 Harvard symposium in 2009. I would urge you, again, to
25 look at their briefing below, their docket 58 in the

1 district court responds to our motion to dismiss by
2 citing a 2004 article, that they actually included in
3 the joint appendix.

4 You can look at joint appendix 80 to 83,
5 their theory of underwriter conspiracy with issuer
6 insiders is set forth right there on those pages of that
7 2004 article, well before the 2 years. And again in
8 addition, the 2000 -- their complaint, which talks about
9 lock-up, you can look specifically at joint appendix 59
10 to 61 to see how lock-up was alleged to be a critical
11 part of their underlying theory.

12 Finally, it is not true again that the IPO
13 litigation was only about underwriters. There were
14 individual issuer defendants at issue in the IPO
15 litigation. And, in fact, Judge Scheindlin's opinion
16 goes into some detail about the -- the alleged
17 conspiracy that they are saying -- the alleged group
18 that they are saying they couldn't have found out.

19 In fact, she says -- this at pages 356 and
20 358 of the Judge Scheindlin opinion, we will provide
21 quotations that show that their theory was very well
22 known. Thank you.

23 JUSTICE SCALIA: Thank you Mr. Landau.

24 The case is submitted.

25 (Whereupon, at 12:01 p.m., the case in the

1 above-entitled matter was submitted.)

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